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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ADAM WEISBLATT, JOE HANNA, and DAVID TURK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

APPLE INC., AT&T INC., AT&T MOBILITY LLC, and Does 1-10,

Defendants.

Case No. 5:10-cv-02553 RMW

REPLY IN SUPPORT OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

N.D. LOCAL RULE 3-12

The Hon. Ronald M. Whyte

Related Case:

Colette Osetek v. Apple Inc.
Case No. 5:10-cv-04253 JW

INTRODUCTION

Plaintiff Osetek's opposition to Apple Inc.'s ("Apple") motion to relate her case, *Osetek v. Apple Inc.* ("*Osetek* action"), to the instant action ignores the plain language of Civil Local Rule 3-12. Rule 3-12 requires that actions be related when they "concern substantially the same parties, property, transaction or event" and an "unduly burdensome duplication of labor and expense or conflicting results" would be likely if the actions are not related. Here, the cases are filed on behalf of the same purported nationwide class (purchasers of the iPad 3G), against the same defendant, Apple. They concern *exactly* the same "property, transaction and event" – the money plaintiffs and the purported class members paid for their iPad 3Gs, and the advertising of data plans for the iPad 3G. If the cases are not related, the same issues will be litigated in different actions on behalf of the same purported class against the same defendant. That is precisely what Rule 3-12 was intended to preclude.

Plaintiff seeks to evade application of the rule based on her decision not to name AT&T Mobility LLC ("ATTM") as a defendant. But that is precisely why Rule 3-12 requires that the parties be "substantially the same," not that they be identical. Were the rule otherwise, a plaintiff could game the system by adding or omitting a defendant in an otherwise identical lawsuit, just as plaintiff has attempted to do here. Plaintiff's ploy is both transparent and meritless. While she may prefer to prosecute her claims separately, she may not circumvent this Court's established procedures serving the interests of judicial economy and preventing conflicting rulings. The cases fall squarely within Rule 3-12 and must be related.

RELEVANT BACKGROUND

There are three related complaints currently pending in this District and Division, all of which involve virtually identical allegations concerning the iPad 3G. The present action, *Weisblatt*, was filed against Apple and AT&T Mobility LLC ("ATTM") on June 9, 2010. Plaintiff Weisblatt alleges that Apple and ATTM falsely advertised the availability of certain ATTM data plans for the iPad 3G. Three days later, on June 11, 2010, *Logan v. Apple Inc* et al., was filed, alleging essentially identical claims against Apple and ATTM concerning the iPad 3G. This Court related the two cases on September 14, 2010. (Doc. No. 40).

Over three months later, on September 20, 2010, plaintiff filed a third complaint, *Osetek v. Apple Inc.*, Case No. 5:10-cv-04253-JW, against Apple. *Osetek* is currently pending before Judge Ware. *Osetek* is based on the same factual allegations regarding the advertising of ATTM's data plans for the iPad 3G as *Weisblatt* and *Logan*. The same three causes of action alleged in *Osetek* are also alleged in *Weisblatt* and *Logan*; indeed, the causes of action in *Osetek* and *Logan* are identical. (*Weisblatt* also alleges additional causes of action based on the same facts.)

ARGUMENT

Under Local Rule 3-12, actions are related when: "(1) [they] concern substantially the same parties, property, transaction or event; and (2) [i]t appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges." N.D. Cal. L-R 3-12. The *Osetek* complaint unquestionably satisfies both prongs of the rule.

I. THE WEISBLATT AND OSETEK ACTIONS CONCERN SUBSTANTIALLY THE SAME PARTIES, AND INVOLVE IDENTICAL PROPERTY, TRANSACTIONS, AND EVENTS.

The two complaints concern substantially the same parties. Plaintiff Osetek purports to represent the same purported class alleged in both the *Weisblatt* and the *Logan* actions[1] against the same defendant – Apple. The *Weisblatt* and *Logan* actions also name ATTM as a defendant. But the presence of an additional defendant is immaterial to a related-case determination. Rule 3-12 requires only "substantially the same parties," not identical parties. *See, e.g., Fin. Fusion, Inc. v. Ablaise Ltd.*, 2006 U.S. Dist. LEXIS 97911, *10 (N.D. Cal. Dec. 15, 2006) (granting motion to relate cases where there was not exact identity of parties).

Further, the *Osetek* complaint involves the same "property, transaction, or event" as the *Weisblatt* and *Logan* complaints. All three complaints allege the same purported class of

[1] *Compare Osetek* Compl. ¶ 35 (alleging a class of "[a]ll persons in the United States who purchased or ordered an Apple iPad Wi-Fi + 3G between January 27, 2010 and June 7, 2010"), *with Weisblatt* Compl. ¶ 70 (alleging a class of "[a]ll persons in the United States who purchased or ordered an Apple iPad with 3G capability on or before June 6, 2010"), *and Logan* Compl. ¶ 62 (alleging a class of "[a]ll persons . . . who purchased, between January 27, 2010 and June 7, 2010 . . . an Apple iPad Wi-Fi + 3G in the United States for their own use, rather than resale or distribution").

consumers seeking to recover based upon the same advertising of ATTM's iPad 3G data plans prior to June 7, 2010. Plaintiffs in all three actions seek identical recovery – a refund of the iPad purchase price – on behalf of those identical purported classes. In fact, Ms. Osetek is a putative class member in both this action and in *Logan*. Osetek cannot seriously dispute that her action seeking to recover from Apple the *same* monies for the *same* purported class members for the *same* iPad purchases falls squarely within Rule 3-12. Any other conclusion would subvert its core purpose of the Rule.

II. THERE WILL BE SIGNIFICANT AND UNNECESSARY DUPLICATION OF LABOR AND EXPENSE, AS WELL AS RISK OF CONFLICTING RULINGS, IF THE ACTIONS ARE NOT RELATED.

Plaintiff Osetek argues that because her complaint includes only three causes of action, her legal claims are distinguishable from the seven causes of action in the *Weisblatt* complaint. Osetek's argument is frivolous. Osetek alleges three causes of action: purported violations of California's unfair competition law (§17200), false advertising law (§17500), and Consumer Legal Remedies Act (§1750). *Weisblatt* and *Logan* allege *exactly the same three causes of action*.

The fact that the *Weisblatt* complaint contains four additional common law claims based on the same facts is irrelevant to the related case determination, *as this Court has already found*. The Court has already related *Logan*, which alleges the same three causes of action as *Osetek*, to *Weisblatt*. (Doc. No. 40.) Notably, Osetek makes no effort to distinguish this Court's prior order, because she cannot; she simply ignores it. But plaintiff cannot ignore the fact that her complaint, like *Logan*, falls squarely within Rule 3-12. Osetek may not litigate the same legal and factual claims on behalf of the same purported class, in the same district and division, before a different judge.

Permitting her to do so would result in precisely the wasteful duplication of effort and risk of conflicting rulings that Rule 3-12 is intended to avoid. Because the factual issues are identical, discovery and related motion practice would necessarily overlap. The putative classes are the same, and therefore class certification motions would result in either conflicting class rulings by two judges in the same district, or identical classes proceeding to trial on parallel tracks. In the

latter case, there would also be a substantial risk of duplicative recovery in violation of Apple's due process rights.

CONCLUSION

Plaintiff may not subvert Rule 3-12 and prosecute the same legal and factual claims on behalf of the same purported class in an effort to recover the same monies from the same defendant, Apple, before a second court in the same district. Osetek's complaint presents a paradigm case for application of Rule 3-12. This Court should reject plaintiff's attempt to circumvent the plain language of Rule 3-12 and enter an order relating the later-filed *Osetek* action to this first-filed action.

Dated: October 12, 2010

PENELOPE A. PREOVOLOS
ANDREW D. MUHLBACH
HEATHER A. MOSER
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By: /s/ Heather A. Moser
HEATHER A. MOSER

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CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on October 12, 2010, I served a copy of:

REPLY IN SUPPORT OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

☒ **BY OVERNIGHT DELIVERY [Fed. Rule Civ. Proc. rule 5(b)]** by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by UPS, at 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices.

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VIA OVERNIGHT MAIL

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 12th day of October, 2010.

Brenda J. Fuller
(typed)

Brenda Fuller
(signature)